89-1220

Supreme Court, U.S.
FILED
JAN 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

IN RE VICTOR H. VAN SANT

On Writ of Mandamus to the
Judges of the
U.S. Court of Appeals for the
Federal Circuit

Petition for Writ of Mandamus

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Questions Presented

A. Does the practice of the Federal Circuit Court of Appeals under Local Rule 47.8 of issuing summary, unpublished, not-citable-as precedent opinions to control its docket violate the constitutional or statutory rights of petitioner to appellate due process and equal protection, and justify exercising this court's supervisory mandamus authority, where:

(1) Local Rule 47.8 contains no objective criteria for determining which appellate cases shall receive a published opinion, can only be administered arbitrarily, and its operation has caused an appearance and belief that summary court decisions disposing of cases are arbitrarily made;

(2) Local Rule 47.8 and comparable

rules of other U.S. Circuit Courts have been widely condemned by bar members and legal commentators as violating constitutional and statutory due process and equal protection requirements;

(3) Local Rule 47.8 and comparable rules of other U.S. Circuit Courts have never been approved by Congress, have never been reviewed or approved by this court in over 17 years of operation, yet impact thousands of cases each year, causing this petition to present first impression issues of national importance involving the lawful administration of U.S. appellate courts; and

(4) the unpublished opinion below is clearly erroneous, and by not carefully addressing serious issues of jurisdiction and "res judicata" would allow an irregular district court order to nullify Congressional statutes and decisions of this Court preventing

federal employees from being retroactively separated from government service.

B. In the alternative, based on (4) above, should a writ of certiorari issue to vacate and reverse the judgment below.

Parties Below

Besides petitioner, the only party below was respondent United States Postal Service.

Mandamus Parties

Relief is necessarily sought herein against all judges of the United States Court of Appeals for the Federal Circuit in active service, who are responsible for its local rules under F.R.A.P. Rule 47 (Appen 65): Chief Judge Howard T. Markey; Judges Glenn L. Archer, Jr., Jean Galloway Bissell, H. Robert Mayer, Paul R. Michel, Pauline Newman, Helen W. Nies, S. Jay Plager, and Giles S. Rich.

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Opinions Below

The unpublished opinion of the Federal Circuit in Victor H. Van Sant v. United States Postal Service, No. 89-3163 below, dated October 6, 1989, is reproduced at Appen 1-10.

Other relevant opinions reproduced in the Appendix are:

Opinion and Order of Merit Systems Protection Board in Victor H. Van Sant v. United States Postal Service, Docket No. DC 34438810242, dated January 9, 1989, Appen 11-23. 39 MSPR 408 (1989).

Unpublished Per Curiam opinion of US Court of Appeals for the Fourth Circuit in Van Sant v. U.S. Postal Service, No. 84-2387 (L) and U.S. Postal Service v. Van Sant, No. 85-1007, dated August 29, 1985, Appen 24-28.

Unpublished Memorandum Opinion and Order of U.S. District Court for the

Eastern District of Virginia, Alexandria Division, in Van Sant v. U.S. Postal Service, et al., Civil Action No. 84-417-A, dated October 24, 1984, Appen 29-49.

Jurisdiction

Statutory grounds. The judgment of the Court of Appeals below was entered on October 6, 1989. Petitioner filed a timely petition for rehearing with suggestion for rehearing en banc. The petition for rehearing was denied by an order dated and filed November 3, 1989. The suggestion for rehearing en banc was denied by an order dated and filed November 17, 1989. This court has mandamus jurisdiction under U.S.C. §§ 1651 and 1254.

Why mandamus is appropriate under Supreme Court Rule 26. The text of the petition addresses why exceptional circumstances exist and an exercise of

supervisory mandamus is appropriate. Mandamus would aid the Court's certiorari appellate jurisdiction. In 17 years of Court of Appeals local rules similar to 47.8, however, no review by certiorari has been granted making a mandamus petition necessary for adequate relief.

Constitutional and Statutory Provisions, Regulations, and Court Rules Involved

The following constitutional and statutory provisions, regulations, and court rules are involved, reproduced in the Appendix, as indicated:

A. Constitutional Provisions

1. Fifth Amendment due process clause. Appen 54.

2. Fourteenth Amendment equal protection clause. Appen 54.

B. Statutory Provisions

1. Appeal jurisdiction of U.S. Federal Circuit Court of Appeals over

M.S.P.B. decisions. 28 U.S.C. §1295 (a) (9), Appen 58; 5 U.S.C. §7703 (b) (1) Appen 56-57; Savings Clause of Civil Service Reform Act of 1978, 5 U.S.C. §1101 Note, Appen 54.

2. Appeal jurisdiction of US Circuit Courts of Appeals. 28 U.S.C. §43(a), Appen 57; 28 U.S.C. §1291, Appen 57.

3. All Writs Statute. 28 U.S.C. §1651. Appen 59.

4. Veterans Preference Act (transfer of functions). 5 U.S.C. §3503. Appen 54.

5. Back Pay Act. 5 U.S.C. §5596. Appen 55-56.

6. Transfer to another court to cure want of jurisdiction. 28 U.S.C. §1631. Appen 58.

7. Court rule making power. 28 U.S.C. §2071, Appen 54-60; and 28 U.S.C. §2072, Appen 60-61.

C. Agency Regulations

1. M.S.P.B., regarding savings provisions of the Civil Service Reform Act of 1978. 5 C.F.R. §1201.191(b). Appen 63-64.

2. M.S.P.B., regarding Reductions in Force. 5 C.F.R. Part 351, Subpart H, Appen 61-62.

3. O.P.M., regarding backpay. 5 C.F.R. Subpart H, Appen 62-63.

4. U.S. Postal Service, regarding Back Pay. Employee & Labor Relations Manual §436, Appen 64-65.

D. Court Rules

1. Federal Rules of Appellate Procedure, Rule 47. Appen 65.

2. U.S. Court of Appeals for the Federal Circuit local rule 47.8. Appen 65-66.

3. U.S. Court of Appeals for the Fourth Circuit, local rules 36.3, 36.4, 36.5. Appen 67-68.

4. Federal Rules of Civil Procedure, Rule 60 (b) (4). Appen 68-69.

STATEMENT OF THE CASE

Decision below under Local Rule 47.8. Acting under authority conferred by Local Rule 47.8, Appen 65-66, the Federal Circuit has disposed below of an appeal brought by petitioner Van Sant from an M.S.P.B. decision denying relief from a proposed retroactive separation by his agency by issuing an unpublished, not-citable-as-precedent opinion, Appen 1-10. The opinion: (1) concludes that the Federal Circuit does not have jurisdiction over Van Sant's appeal because of the Savings Clause of the 1978 Civil Service Reform Act excluding from its jurisdiction "administrative proceedings" "pending" on January 11,

1979, 5 U.S.C. §1011 Note, Appen 54; and (2) rejects a motion made by respondent U.S. Postal Service to transfer the appeal to the U.S. District Court for the Eastern District of Virginia under 28 U.S.C. §1631, Appen 58, as not "in the interest of justice." In a timely petition for rehearing with suggestion for rehearing en banc petitioner urged that the reasoning used in the panel's hasty opinion contained elementary errors, that the opinion unjustifiably ignored applicable, controlling Supreme Court decisions, that the issues presented were wholly unsuitable for summary disposition in an unpublished opinion, and that such a disposition violated petitioner's rights to appellate due process. Rehearing was denied on November 3, 1979.

Background. After lengthy proceedings, including two remands from

the Fourth Circuit, it was eventually determined in 1984 by the U.S. District Court for the Eastern District of Virginia, Appen 29-49, that Van Sant, a career Civil Service employee with veteran preference, had been improperly released from federal employment by the U.S. Postal Service in October 1971 through a reduction in force notice that failed to respect his statutory rights to transfer under the Veterans Preference Act, 5 U.S.C. §3503, Appen 54. This determination was upheld in 1985 by the Fourth Circuit, Appen 24-28, which later also ruled under the Equal Access to Justice Act, 5 U.S.C. 2412, that the position of the United States during the agency's long resistance to Van Sant's claim was "not substantially justified," Van Sant v. U.S.P.S., CA4 1986, 805 F.2d 141, cert.den 480 US 935 (1987).

The agency's long resistance confronted the district court with a claim, inter alia, to 13 year's back pay (subject to offset by outside earnings, and other factors), Appen 65. In fashioning relief the district either disregarded or did not consider that its determination of an improper release constituted a finding of "an unjustified or unwarranted personnel action" by Van Sant's agency within the meaning of the Back Pay Act, 5 U.S.C. 5596, Appen 55-56, and parallel U.S. Postal Service regulations, Appen 64-65, (hereafter collectively called "Back Pay Act provisions"), and that appropriate relief to Van Sant was mandated by those provisions. (The Back Pay Act states an employee so injured is "entitled on correction of the personnel action, to receive for the period for which the personnel action was in effect ... an

amount equal to all ... the pay ... which the employee normally would have earned during the period if the personnel action had not occurred ... [and] for all purposes is deemed to have performed service for the agency during that period..." Appen 55-56.)

Instead, ignoring Back Pay Act provisions and related decisional law, the district court, sua sponte, decided it could determine "the proper date for the notice of termination" to Van Sant, and ordered relief as if such a notice had been issued, Appen 48-49. Thus, although no agency notice of termination was ever given to Van Sant on "December 7, 1971," and although no opportunity was given to Van Sant to show that he would have been entitled to retention on that date under veteran's rights and Civil Service regulations, the district court nevertheless ordered

that Van Sant receive only "such additional salary and benefits which he would have been paid had the notice of termination been given on December 7, 1971, instead of August 27, 1971," Appen 49.[1]

In an unpublished, per curiam decision in 1985 affirming the district court, the Fourth Circuit gave no authority, or explanation, for affirming the relief, but simply declared there was "no merit" to Van Sant's contentions that he was entitled to reinstatement and back pay under Back Pay Act

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[1] The reasoning of the district court in believing Van Sant could have been lawfully notified of a proposed release on December 7, 1971, was plainly mistaken. On that date the Postal Service resumed performing Van Sant's job function with Postal Service employees, and merged his "architect" position with the position of certain lower-ranking draftsmen. Van Sant would have had "bumping rights" to the new position as the most qualified candidate.

provisions, Appen 28.

Post-1985 events. Following the 1985 Fourth Circuit decision, the Postal Service advised Van Sant by letter that it regarded him as entitled to back pay from his October 12, 1971, separation to "January 22, 1972." The letter remarked that since "thirty days notice of an RIF was required," and a 46-day period had occurred between the original termination notice of August 27, 1971, and Van Sant's separation in October 1971, January 22, 1972, would accord Van Sant a similar 46-day period measured from December 7, 1971. On February 8, 1988, USPS confirmed by letter that this was the agency's final position.

Appeal to MSPB. Van Sant timely appealed to the MSPB under 5 CFR 1201.3(a)(10) ("Separation ... because of reduction in force") and USPS regulations conferring specific appeal

rights to the MSPB on preference-eligibles involving "involuntary removals" (USPS Employee and Labor Relations Manual §366.3) and violations of "procedures and rights" (ELM 365.14; ELM 365.13; ELM 365.35).

Van Sant's appeal to MSPB asserted that the January 22, 1972, retroactive separation intended by USPS was in flagrant violation of all established procedures for the separation of federal employees. The appeal stressed that the District Court's non-self-executing order could not be carried out except by unlawful agency action, in violation of mandatory separation regulations and explicit Supreme Court decisions.

M.S.P.B. dispositions below. The MSPB regional office on April 20, 1988, rejected Van Sant's appeal on grounds of jurisdiction. The Board's decision on appeal on January 9, 1989, Appen 11-23,

accepted Van Sant's appeal, but concluded that the Board could not "retain jurisdiction," Appen 22, reasoning that the matter had been "judicially adjudicated," ibid, and that it "has no authority to set aside an order of an Article 3 court," Appen 21. Consequently, despite indications it viewed the district court order as erroneous, without addressing any other issues or explaining the basis for its conclusion, the Board concluded "this appeal is barred by res judicata," Appen 22. (The opinion, however, pointedly remarked, "Any further remedy concerning this case lies in the federal court system," Appen 23.)

ARGUMENT

I. Petitioner Van Sant has statutory and constitutional rights to appellate due process and equal protection.

Congressional statutes. A statutory right either to "appeal," or to achieve review "upon a writ of error," has existed in US federal courts in civil cases continuously since the first Judiciary Act of 1789, 1789 Stat. at L. 83-85, and is reflected today in 28 USC §§ 43(a), 1291, and 1295(a)(9), Appen 57-58. Although courts may adopt rules of practice, Congress has expressly prohibited any rule of court that is not "consistent with Acts of Congress," or which abridges a "substantive right," 28 USC §§ 2071 and 2072, Appen 59-61.

Reasoned opinions historically rendered in all cases. Historically, a review of trial court error was accomplished by applying to a higher court for a "writ of error" in common law cases, or by a "petition" or "bill" of review in equity cases. In both

instances under historical English law and practice the higher court proceedings were not a continuation of the initial case, but were "new" proceedings. In equity, review in all cases was conducted de novo from the beginning. At common law, review addressed the specified "errors" that were presented in the writ. In both types of proceedings it was the practice for a reasoned higher court explanation of the basis for decision always to be issued in which prior precedent played a dominant role. Though frequently the explanation was orally delivered, it was transcribed by reporters and available for future use. The nature of the higher proceedings as "new" before that tribunal probably operated in part to make unexplained dispositions unthinkable.

After American independence the preparation of appellate court opinions in writing became the universal practice and tradition of American courts for the next 180 years, a tradition marked by the equal entitlement of all litigants to receive a reasoned explanation of the basis for decision carefully expressed in terms of legal precedent that would in turn be applicable to other, and future, cases. See: Martineau, Modern Appellate Practice (1983), pp. 4-7; Baker, "A Compendium of Proposals to Reform the US Courts of Appeals," 37 U. of Fla. L.Rev. 225, 247 (1985); Leflar, "Some Observations Concerning Judicial Opinions," 61 Colum. L.Rev. 810, 811 (1961); Roscoe Pound, The Spirit of the Common Law (1921), pp. 182-183.

Van Sant's statutory argument. Van Sant believes that his statutory right to an "appeal" conferred by Congress has

been defined by long English and American tradition and practice, and that no "substantial" infringement of the traditional content of this right is permissible by court rules that have not been expressly approved by Congress. And Federal Circuit Court Local Rule 47.8 has never received Congressional approval.

This Court has held that where an "appeal" right is conferred by statute, due process, equal protection, and legislative intent are applicable to questions of its interpretation. See, e.g., National Union of Marine Cooks & Stewards v. Arnold, 1954, 348 US 37 (subjecting a state court appellate system to an "equal protection" review; at p. 45 Black and Douglas remark that, even if not constitutionally required, once it is established by statute, an appellate system "cannot be conducted so

as to deny ... 'due process' ... Cole v. Arkansas, 1948, 333 US 196, 201, 202.").

A Constitutional right to appeal also exists in civil cases. In addition, petitioner Van Sant believes he has a constitutional right to an appeal which has been violated by the summary, unpublished opinion below. In various decisions this Court has correctly ruled that there is no basis for a Constitutional right of appeal in criminal cases, since under English common law at the time of the Revolution (and for centuries preceding) the verdict of the jury in criminal cases was treated with finality. English law, however, did confer a right of review in civil cases. Nevertheless, in National Union of Marine Cooks & Stewards v. Arnold, supra, at U.S. 43, for example, without considering English law carefully, this Court stated that civil

"review is not a requirement of due process", relying in good part on criminal law decisions.

The historical record could hardly be clearer that from as early as the first golden period of English common law in the 13th century a "writ of error" was obtainable by right from King's Bench to review errors committed by the Court of Common Pleas, the basic English court of civil common law jurisdiction. And from King's Bench a review of right could be had in Parliament, the highest English common law court. The Second Statute of Westminster as early as 1289 took cognizance of, protected, and expanded the procedures for obtaining review of right by "writ of error." In Chancery, review was always de novo, beginning in the 15th century. In brief, there is no basis for doubt whatever that an effective right of appeal in civil cases

was a centuries-old accomplishment of English law at the time of the Revolution. See generally, Theodore Pluckett, A Concise History of the Common Law (1988) pp. 28-30, 147, 163, 171-172, 180, 189, 191, 200-203, 367; Martineau, op.cit., p.4; Holdsworth, A History of English Law (7th ed. 1956).

It follows that Van Sant has a constitutional basis for asserting that his property interest under, inter alia, the Veterans Preference Act, Appen 54-55, prohibits a Court of Appeals rule that drastically abridges his entitlement to a reasoned decision from the court, citable-as-precedent, if such a rule violates the Fifth Amendment's "due process" clause.

II. An exercise of this Court's supervisory mandamus power is appropriate.

Mandamus is "appropriately issued when there is a 'usurpation of judicial power'," Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964). "'The traditional use of the writ ... has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction,'" Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 383 (1953), quoting Roche v. Evaporated Milk Assn., 319 U.S. 21, 26 (1943).

In Schlagenhauf v. Holder, supra, and LaBuy v. Howes Leather Co., 352 U.S. 249 (1957), this Court approved the use of supervisory mandamus by Courts of Appeals to review district court orders issued under novel provisions of the Federal Rules of Civil Procedure the validity and construction of which were unsettled. In Schlagenhauf the Court said, "Here ... the petition [for mandamus] was properly before the court

[of appeals] on a substantial allegation of usurpation of power in ordering any [physical and mental] examination of a defendant, an issue of first impression that called for the construction and application of Rule 35 in a new context," U.S. 110, emp.sup. In explaining its decision to grant review the Court remarked that it had special obligations toward the "construction and application of the Federal Rules of Civil Procedure" "'which by law it is the duty of this court to formulate and put into force,'" quoting Los Angeles Brush Corp. v. James, 272 U.S. 701, 706 (1927).

In LaBuy, supra, involving whether the district court's reference of an antitrust suit to a master under new F.R.C.P. 53(b) was sound, the Court stated: "The importance of the question in the administration of the Federal

Rules of Civil Procedure ... led to our grant of a writ of certiorari ... We conclude that the Court of Appeals properly issued the writs of mandamus," U.S. 251. "We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system," U.S. 259-260.

It follows, of course, that "supervisory control" of Courts of Appeals by the Supreme Court is no less "necessary to proper judicial administration in the federal system."

Circumstances which make an exercise of supervisory mandamus authority highly appropriate have been held to include: (1) "a significant question of first impression where the failure to [grant mandamus] may adversely affect the efficient operation of the ... courts," In re Cement Antitrust Litigation (MDL

No. 296), CA9 1982, 688 F.2d 1297, 1304, aff'd 459 U.S. 1191; (2) "a new and far reaching question of major importance to the ... courts, that ... is likely to continue to evade review, and ... the resolution [of which] would add importantly to the efficient and orderly administration of the ... courts," In re Cement Antitrust Litigation, supra, 1305; and (3) a local rule of court restricting attorney, party, and third person communications in class action suits not "consistent with Acts of Congress," which Congress "never intended ... to authorize," and "outside the power granted to the district court," Rodgers v. U.S. Steel Corp., CA3 1975, 508 F.2d 152, 163, 164, cert.den. 423 U.S. 832.

The holding in Rodgers, supra, was reached despite the fact that local rule 34(d) was "prepared under the

sponsorship of the Federal Judicial Center," p. 164. The Federal Judicial Center, the court said, "had no authority to enlarge the statutory rulemaking authority of the district courts," p. 165.

Based on the reasoning and holdings in the above case, clear precedent exists for supervisory mandamus in this case.

III. Local Rule 47.8 contains no objective criteria for determining which cases on appeal shall receive full and which shall receive second-class opinion treatment, invites, and necessarily causes purely arbitrary dispositions by the Federal Circuit.

Local Rule 47.8 of the Federal Circuit gives blanket authority to a panel of the court to decide that if its reasons used, if any, to explain a decision do not "add usefully to the body of law," the panel's opinion or order will not be published, and will

not be citable in future cases. Thus, the panel can conveniently, but no less conclusively, dispose of any appeal summarily without concern that an arbitrary mistaken decision will later return to haunt the court. The rule provides simply:

> "(a)...Disposition of appeals may be announced in a published or unpublished opinion or order.
>
> ...
>
> (c)...Unpublished opinions and orders are those unanimously determined by the panel as not adding significantly or usefully to the body of law and not having precedential value. Opinions and orders designated as unpublished shall not be employed as precedent by the court, and may not be cited by counsel as precedent, except in support of a claim of res judicata, collateral estoppel, or law of the case..." Appen 65-66.

The rule contains no objective criteria for determining when a panel decision to proceed by summary, unpublished opinion or order may be proper, or improper. In short, the way the rule operates is that what type of

opinion a panel chooses to prepare, for whatever subjective reason, itself determines whether parties receive a full, carefully prepared, citable-as-precedent decision seriously treating the issues in their case, or receive only a time-saving, hastily-prepared, back-of-the-hand discard. The rule not only invites arbitrary conduct differentiating cases, but, even worse, it necessarily causes arbitrary differentiations, since it has no standards capable of causing any other conduct.

As this Court said as long ago as 1884 in Hurtado v. California, 110 U.S. 516, 535-536 (1884), arbitrary conduct does not meet the requirements of due process:

> "Law is something more than mere will executed as an act of power. [Due process] must be not a special rule for a particular person or a particular case, but ... 'the

general law..." "Arbitrary power ... is not law ..."

IV. Under Local Rule 47.8 unpublished dispositions have occurred widely; the rule in operation has generated controversy, and caused an appearance and belief that court behavior is arbitrary.

In a lengthy article reporting on the performance of the Federal Circuit after four years of existence, "Markey's Fast Track Approach Attracts Controversy," Legal Times writer Steve Nelson on August 4, 1986, stated the following:

> "Another procedural point that has many lawyers concerned is the great number of unpublished opinions. While the clerk's office couldn't provide any current statistics, former clerk George Hutchinson did a study in April 1984 which found that 66% of the court's opinions in its initial 18 months were unpublished." (p. 6)

> "Lawyers who practice in the court's various substantive areas -- patents and trademarks, international trade, federal employee rights, and government claims -- question whether the court is sacrificing due process rights in its efforts to control its docket. This has been a particularly controversial issue among attorneys

appealing Merit Systems Protection Board decisions." (p. 5)

"According to year-old figures, which are the most recently compiled, nearly 70% of the court's 2,246 filings comes from the Merit Systems Protection Board..." (p.5)

"[F]ormer Federal Circuit Judge Shiro Kashiwa [confirms that] 'a priority [of Chief Judge Markey is] that the court not have a lagging calendar... The court is very proud of its current calendar...'" (p.5)

"The enormity of the court's federal employee rights caseload, combined with the judges' lack of familiarity with the subject matter, has led to some speculation that the court has treated the federal personnel cases with some amount of contempt." (p.5)

"MSPB decisions are rarely reversed...notes [Broida of Broida & Passman]." (p.6)

This Court has frequently emphasized the importance of preserving an appearance of judicial propriety to avoid undermining public confidence in the judicial process. "We must continuously bear in mind that to perform its high function in the best

way 'justice must satisfy the appearance of justice.'" Liljeberg v. Health Services Acquisition Corp., ___ US ___ (1988), 108 SCt 2194, 2204, quoting In re Murchison, 349 US 133, 136 (1955). But a Court of Appeals rule that provides no protection against arbitrary decisions to dispose of appeal issues by unpublished, second-class opinions and orders cannot hope to avoid the appearance of impropriety, as the 1986 Legal Times article illustrates.

V. Local Rule 47.8, and comparable rules in other US Courts of Appeals have been widely condemned by bar members and legal commentators as violating constitutional and statutory due process and equal protection requirements.

Local Rule 47.8, adopted in 1982, is a highly abbreviated version of essentially comparable local rules used by other US Circuit Courts of Appeals generally since 1973, following certain

recommendations made by a special national Advisory Council, and by the 1972 Judicial Conference of the United States. For details of their origin, and the varying provisions used in different Circuit Courts, see, Reynolds and Richmond, "The Non-Precedential Precedent, Limited Publication, and No Citation Rules in the US Courts of Appeals," 78 Colum.L.Rev. 1167 (1978). In the Appendix hereof, pages 67-68, is the text of the Fourth Circuit's comparable local rule, as worded in 1985 when that court affirmed, in an unpublished opinion, Appen 24-28, the 1984 district court relief order at the center of this controversy. (The Fourth Circuit's rule, like most Circuits, purports to contain "standards for publication" once an opinion is written. But there is no obligation to write an opinion to meet any of standards, as

occurred when the 1985 panel of that court summarily disregarded Back Pay Act provisions and decisions of this court).

The 1973 and later rules that have radically changed the opinion writing practices of US Courts of Appeals are divisible into: (1) those prohibiting citation of the new category of "unpublished" opinions and orders; and (2) those dispensing with the need for any explanation and opinion altogether. While the former were recommended by the Advisory Council and the 1972 Judicial Conference, the latter were entirely self-adopted, see Reynolds and Richmond, op.cit., p. 1170.

Since 1972, the dispensing-with-opinions-altogether practice has been consistently condemned by serious legal commentators, writers and the Bar. See, e.g., Baker "A Compendium of Proposals to Reform the US Courts of Appeals," 37

U. of Fla. L.Rev. 225 (1985), p. 248 ("The consensus has been that litigants are entitled, as a matter of policy, to some statement of reasons for a decision. The courts of appeals have violated this consensus by providing for and rendering judgments without any opinion."); Reynolds & Richmond, op.cit., p. 1174 ("The practice under these rules -- failure to provide the parties ... with any hint of the court's reasoning -- has been uniformly condemned by commentators, lawyers, and judges," with citations given).

Significantly, also, former endorsement of the proposal to prohibit the citation of unpublished opinions has now been withdrawn by the leaders of the 1972 Advisory Council. See Carrington, Meador, Rosenberg, Justice on Appeal (1976), p. vi; 36-39. ("Experience with the no-citation rule suggests that it

raises difficulties that are as distressing as the problems that non-publication is designed to overcome," p. 37. Among the difficulties cited are: unpublished decisions are relied on nevertheless by courts and parties unfairly in the know; injustice and confusion occurs in multi-panel appellate courts; the practice fails to "promote uniform and coherent enunciation and application of the law;" and there is "a serious risk of abuse by judges who prefer to secrete some decisions which should be published." "We conclude that the no-citation rule has such undesirable side-effects that it should be abandoned," pp. 37-39.) Prof. Rosenberg was chairman of the Advisory Council.

The no-citation practice has been increasingly condemned by others also, including repeatedly by the D.C. Circuit

Court of Appeals' Advisory Committee. See: "Report and Recommendations of the Advisory Committee on Procedures Concerning Unpublished Dispositions by the US Circuit Court of Appeals for the D.C. Circuit," June 8, 1984. The 1984 Committee Report recommended: "The no-citation rule should be eliminated." Referring to a 200-page, in depth study of the no-citation rule by a subcommittee, the 1984 Report stated:

> "The Subcommittee study raises questions about the requirements of stare decisis and other jurisprudential concerns pertaining to the concept of nonbinding judicial authority. The Subcommittee, for example, demonstrates that within our judicial framework stare decisis has historically promoted judicial legitimacy by insisting that each decision be constrained by precedent and itself constrain future dispositions. When a decision is neither published nor accorded precedential effect, public scrutiny is minimized, and a safeguard against unfair decisions is eliminated."

Condemnation of both sets of rules has centered on the erratic, subjective

application of the new procedures in practice, and on concern over damage to the essential core obligations of appellate courts under basic common law principles to review trial court error carefully, and to adhere to precedent in decision-making.

In its detailed, 200 page report on unpublished memoranda written by the D.C. Circuit Court of Appeals, referred to previously, the subcommittee of the D.C. Circuit's Advisory Committee on Procedures concluded that 40% of the D.C. Circuit's unpublished opinions in 1983 should have been published, based on that Court's own local rule criteria. Although urging that the court's publication criteria be made more objective, the Committee concluded that subjective determinations "will inevitably reflect the experience and values of the decisionmaker" (Report,

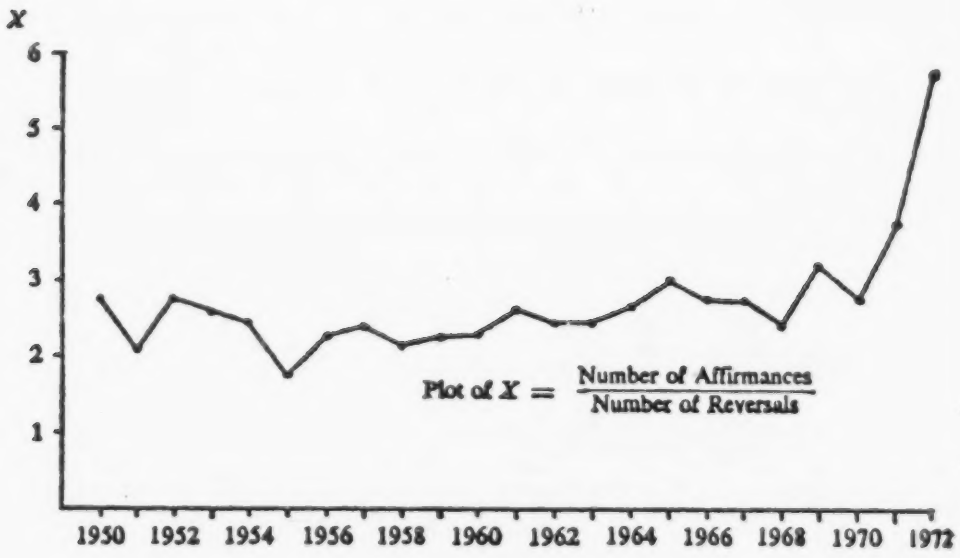
p. 7), that "a presumption in favor of publication is warranted" (p. 8), but that "the no-citation rule should be eliminated," (p. 9).

The Subcommittee's Report noted serious constitutional problems with "a body of secret law that is not published and cannot be cited," Subcommittee Report, p. 2. It observed that the Fifth Amendment's due process clause "guarantees a right to procedural regularity" and "a substantive right to freedom from arbitrary governmental action," p. 35, and that the 14th Amendment/Fifth Amendment Equal Protection clause "guarantees a right to equal treatment...in the absence of compelling governmental [justification]," id.

A detailed study of Fifth Circuit experience with rules antedating, but similar to, the 1973 rules was made by

Prof. Charles J. Haworth in "Screening and Summary Procedures in the US Courts of Appeals," 1973 Wash.U.L.Q. 257-326 (1973). In 1968, faced with the heaviest caseload of any Circuit Court, the Fifth Circuit adopted case screening and summary procedures that introduced the Court of Appeals practice of deciding cases without a written opinion. The Haworth study revealed that as summary affirmances without opinion grew, the court's overall percentage of reversals began to decline dramatically. Before its new rules, over the preceding 28 years the Fifth Circuit had reversed approximately 27% of judgments appealed, without major year-to-year variation. Under the new rules, by 1971 the reversal rate fell to 19.9%, and by 1972 it fell further to 14.9%. (The chances of an appellant securing a reversal declined from better than 1 in 3 before

1968 to only 1 in 7 by 1972. In the same period no change occurred in the reversal rate of other Circuits studied.) Over the three-year fiscal period 1969 to 1972, Haworth concluded that the Fifth Circuit's opinion-dispensing rules had operated to prevent over 100 cases from being reversed, on a historical basis. The following graph exhibits the dramatic change:



(Footnote 288)

Prof. Haworth attributed the decline in reversals to the sheer time saving involved in a simple "Affirmed," p. 271-272; to the superior efficacy of "a one-line disposition of an entire case" over the traditional per curiam decision to protect the court from an embarrassing "aperture into [its] reasoning," p. 272; and to the fact that opinion-writing causes "uncovering uncited authority...or changing [a] vote on the merits after seeing a draft opinion prepared," p. 319. The "use of affirmances without opinions," he concluded, "leaves litigants with the impression no one really heard their appeal... The rule is...subject to abuse..., subordinates justice to speed, and subverts needed improvements to illegitimate ends" (p. 273).

This Court should respond to the criticisms of learned commentators and

subject Local Rule 47.8 to long overdue supervisory review.

VI. Local Rule 47.8 and the comparable rules of other US Circuit Courts have never been approved by Congress or this Court since their inception; thousands of cases each year are being impacted; this petition presents issues of first impression of national importance involving the lawful administration of US appellate courts.

Local Rule 47.8 and the comparable rules of other US Circuit Courts of Appeals allowing appeals to be decided by unpublished opinions and orders, not-citable-as-precedent, and no more explanatory than the panel chooses, are radical departures from our traditional, centuries-old appellate practice that have never been approved by Congress. Reynolds and Richmond, op.cit., 1169-1172.

Nor has this Court ever approved these rules formally, or granted review of their operation by certiorari or otherwise in the 17 plus years of their existence.

At the current time it is difficult to say precisely what percentage and aggregate number of appeals in US Circuit Courts of Appeals are being disposed of summarily, but the number is extremely high, and far higher than generally realized. In a three-year period studied by the Advisory Committee on Procedures of the D.C. Circuit, 1981-1983, the committee found that the D.C. Circuit published 888 decisions, disposed of 1,735 appeals on motion orders with no published opinion, decided 539 cases heard on the merits without any explanation or published opinion, and decided 233 cases heard on the merits by a memorandum opinion that

was not published. Restated, in terms of all cases terminated in three years by the D.C. Circuit, the figures were: 26.5% by published opinion, 73.5% by unpublished opinion or order.

In remarks to the D.C. Bar in July 1986 shortly after becoming Chief Judge of the D.C. Circuit Judge Wald stated: "There is little question in my mind that more cases will be decided in the future without published opinions -- by order or memorandum --... than [at] present." "Chief Judge Patricia M. Wald on the US Court of Appeals," District Lawyer, Jul/Aug 1986, p. 34. The record in other Circuits varies, but is not dissimilar to the D.C. Circuit, loc.cit.

It is clear that serious constitutional and statutory issues involving due process and equal protection to litigants have been created by new appellate rules that have

massively departed from traditional appellate practice, including Federal Circuit Local Rule 47.8, and that these first impression issues are of grave national importance affecting the integrity and lawful administration of US appellate courts. An overwhelming basis exists for an exercise of supervisory mandamus.

VII. The opinion below has disregarded controlling decisions of this court and is clearly erroneous.

The opinion below concludes that Van Sant is barred from obtaining Federal Circuit relief against a retroactive termination of his federal service through a fictitious "December 7, 1971," "notice of termination" on the ground that the Federal Circuit is without jurisdiction under the 1978 Civil Service Reform Act. At the same time, the opinion declines to transfer Van

Sant's appeal to the Eastern District of Virginia, reasoning that there are no issues warranting further consideration by that court or the Fourth Circuit. This drastic result is achieved through a series of flagrant factual and legal errors that illustrate vividly why justice is imperiled by summary dispositions not intended for publication, and not prepared with care.

At the heart of the erroneous reasoning below is a casual assertion that when the district court concluded Van Sant could not be validly released from federal service by his agency's August 27, 1971, R.I.F. notice (because employees of another federal agency were performing his work, and the October 12, 1971, release violated his veteran transfer rights, Appen. 38) the district court nevertheless "sustained the termination", "ruled that its date

should have been December 7, 1971," and "merely modified the date of the original termination," Appen 8-9. These remarks: (a) are factually inaccurate in regard to the district court's decision; and (b) blithely ignore probably the most fundamental decisions of this Court on federal personnel law.

Plainly, the district court never "sustained" Van Sant's termination. It stated: "In summary, it is only from the December 7, 1971, date that the plaintiff's termination can be valid," Appen. 39. The district court reversed the M.S.P.B. "insofar as it determined that the proper date of the plaintiff's notice of termination was August 27, 1971," Appen. 48. Likewise, in affirming, the Fourth Circuit stated:

> "Notwithstanding the MSPB's legal opinion that this did not constitute a transfer of function, the district court discerned the reality of what occurred: 'the same FDS work -- Van Sant's work -- was

> still being done; it was simply being done by COE personnel.' The district court therefore ruled that it was only from December 7, 1971, the date that COE employees last performed Van Sant's former job function, 'that plaintiff's termination can be valid.'" Appen. 27-28.

In short, both the district court and the Fourth Circuit held that Van Sant's termination on October 12, 1971, was invalid. It follows that these courts intended that a second termination would occur, which they believed could be made valid by judicial fiat. While an error of this magnitude by courts seldom handling federal personnel appeals is one thing, an error of this nature by the Circuit Court charged with achieving national uniformity in federal personnel law is another.

This Court in SEC v. Chenery Corp., 318 U.S. 80 (1943), 332 U.S. 194 (1947) announced that a "fundamental rule of administrative law" is that a federal

court reviewing agency action committed to agency discretion is "powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis," emp.sup., U.S. 196. This opinion below ignore these principles.

In Vitarelli v. Seaton, 359 U.S. 16 (1959), applying Chenery Corp. and Service v. Dulles, 354 U.S. 363 (1957) ("binding" agency personnel regulations have the "force of law" and must be "scrupulously" observed), this Court held that the separation of a federal employee in violation of procedural regulations was a "nullity." Such a separation left the employee legally on the agency's roles. A valid separation could only be obtained by restoring the employee to duty, and initiating correct termination procedures. Vitarelli specifically prohibited retroactive

separations, and held that considerations of what the agency "might" have done were irrelevant to judicial review of what it did do.[2] The opinion below ignores these principles.

And in Bush v. Lucas, 462 U.S. 367 (1983) this Court held that the Back Pay Act of 1966 "extended the right to lost benefits," established in Vitarelli "to every employee affected by a personnel action subsequently found to be unjustified," US 385 n.25. The opinion below ignores this controlling statute.

Another extreme factual and legal error in the unpublished opinion below lies in its casual assertion that the district court "ruled that [the] effective date [of actual termination]

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[2] Over 30 Court of Claims and Circuit Court decisions since 1957 have called the Vitarelli holdings "settled" law.

should have been December 7, 1971," Appen 3, 8, disregarding agency action notifying Van Sant of proposed back pay to "January 22, 1972," Appen 4, and a related failure to focus on key OPM regulations interpreting the Savings Clause of the 1978 Civil Service Reform Act in terms of when agency notifications are given. The mistaken assertions about "December 7, 1971" in the opinion below overlook an elementary distinction in federal personnel law between the date a "notice" of proposed agency action is given, and the "effective date" of the action. Significantly, for example, OPM R.I.F. regulations at 5 C.F.R. Part 351, Subpart H, require "a written notice at least 30 full days before the effective date of release," Appen 60.) The district court's language about a "notice of termination ... on December

7, 1971, instead of August 27, 1971," Appen 49, is clearly referring to the August date on which Van Sant received notice of his proposed October 1971 termination. This leaves the "effective date" of a termination contemplated by the order unclear. The opinion below completely fails to appreciate that the Postal Service has attempted to supply a vital notice period absent from the district court's order (see supra, page 15). Thus, the opinion below entirely misses that it is agency action that has supplied, and notified Van Sant of the "effective date" of proposed termination: January 22, 1972, and that this occurred in 1985 and later, after the 1978 Act went into effect.

Had the opinion below looked at OPM regulations defining the key terms of the 1978 Civil Service Reform Act Savings Clause, it would have observed

that the date on which a notice of proposed agency action is given to the employee is the determining factor in whether an "agency proceeding" is to be considered as "pending" on January 11, 1979. 5 CFR §1201.191(b) states: "An agency proceeding is considered to exist once the employee has received notice of the proposed action," Appen 63-64. Further, the decisive importance of these OPM regulations and of the sentence just quoted is the actual holding in the only judicial decision alluded to in the opinion below, Appen 8, and it fully supports retention of Federal Circuit Court jurisdiction. (!)

Moreover, Wilson v. Turnage, Fed.Cir. 1986, 791 F.2d 151, the cited case, also notes, at 156-157, that the doctrine of "res judicata" is applicable to preclude further litigation only to the cause-of-

action before the court on which judgment is rendered. But the only cause-of-action before the district court (see Chenery Corp. and Vitarelli, supra) when the 1984 order was issued was the August 27, 1971, agency notice of an October separation. Thus, the only "agency proceeding" "under judicial review" on January 11, 1979, was concluded with the Fourth Circuit's 1985 decision concerning that separation. (What has occurred since is a new "agency proceeding" -- the proposed agency termination of Van Sant on January 22, 1972, by retroactive notices given in 1985 and later. The opinion below has confused an improper 1984 judicial intrusion into the cause of action before it with an "agency proceeding".)

Accordingly, the denial below of Federal Circuit jurisdiction over Van

Sant's appeal is plainly erroneous, and could not be sustained in any carefully reasoned decision.

VIII. Serious issues were presented in the appeal below that were disposed of summarily in an unpublished opinion, in an abuse of discretion.

Serious issues were presented in the appeal to the Federal Circuit that were disposed of summarily, or not addressed, in the ill-considered, unpublished opinion below. These include the following:

1. Whether the Federal Circuit Court of Appeals under the 1978 Civil Service Reform Act has jurisdiction over an irregular retroactive agency separation action of a tenured Civil Service employee with veteran preference, initiated after the effective date of the Act, purporting to be authorized by a district court order that cannot be

squared with basic federal personnel law principles, statutes, and decisions of the U.S. Supreme Court.

2. Specifically, whether the Merit Systems Protection Board, and the Federal Circuit Court of Appeals should give "res judicata" finality to a district court order affirmed by a U.S. Court of Appeals in an unpublished, unexplained decision, when it is asserted that the order: (a) went beyond the cause-of-action before the district court; and (b) is "void" because it: (i) exceeded the district court's subject-matter jurisdiction; (ii) deprived the employee of required advance notice of agency action in violation of procedural due process; and (iii) deprived the employee of mandatory statutory relief in violation of substantive due process.

3. Should a transfer to the US District Court for the Eastern District of Virginia be ordered under 28 U.S.C. § 1631 "in the interest of justice," if the Federal Circuit Court of Appeals concludes it is without jurisdiction, in light particularly of Federal Rules of Civil Procedure 60(b)(4), Appen 68, which authorizes relief from a "final" judgment or order where "the judgment is void."

The Federal Circuit's unpublished opinion below fails to address any of these issue at all. It assumes, entirely mistakenly, that the contents of the 1984 district court are entitled to "res judicata" finality, and asserts, entirely mistakenly, that the arguments presented to the M.S.P.B. and the Federal Circuit "were fully considered and rejected" by the district court and the Fourth Circuit, Appen 9. The

sweeping dismissal of Van Sant's appeal has no legal or factual basis. Van Sant's res judicata and voidness arguments have arisen subsequent to the Fourth Circuit's 1985 decision, and have not yet received due consideration by any court.

The failure to address these serious issues and their offhand treatment below is an abuse of Federal Circuit Court discretion, a flagrant abuse in light of the mission of the Federal Circuit to achieve national uniformity in federal personnel law questions.

CONCLUSION; RELIEF SOUGHT

A writ of mandamus should issue to the judges in active service of the U.S. Court of Appeals for the Federal Circuit to exercise this Court's supervisory review authority over the constitutionality and lawfulness of

Local Rule 47.8, under which an unpublished, not-citable-as-precedent opinion was issued below, together with an order vacating the judgment below pending proceedings in this Court. This Court should establish guidelines for the future use, if any, of unpublished opinions and orders by US Courts of Appeals. After guidelines are determined, a remand should be ordered for reconsideration of Van Sant's appeal by the Federal Circuit.

In the alternative, Van Sant requests that this Court issue a Writ of Certiorari, vacate, and reverse the judgment below.

Respectfully submitted,

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Suite 560
Washington, D.C. 20006
(202) 457-9044

Certificate of Service

I hereby certify that service of the foregoing Petition for Writ of Mandamus has been made this 31st day of January, 1990, by mailing a copy or copies by first class mail, postage prepaid, to: (a) the Solicitor General, Department of Justice, Washington, D.C. 20530 (3 copies); (b) counsel of record for defendants, Lynn D. Poole, Esq., U.S. Postal Service, Office of Labor Law, 475 L'Enfant Plaza, Washington, D.C. 20260-1100 (3 copies); and (c) to the Judges of the U.S. Court of Appeals for the Federal Circuit in active service, Chief Judge Howard T. Markey, and Judges Glenn L. Archer, Jr., Jean Galloway Bissell, H. Robert Mayer, Paul R. Michel, Pauline Newman, Helen W. Nies, S. Jay Plager, and Giles S. Rich, U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439 (1 copy each, mailed to each individual).

/s/

Edward Earl Wright
Attorney for Petitioner

APPENDIX

Note: This opinion has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

89-3163

VICTOR H. VAN SANT,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

DECIDED: October 6, 1989

Before FRIEDMAN, BISSELL, and MAYER, Circuit Judges.

FRIEDMAN, Circuit Judge.

DECISION

The petition for review of the Decision of the Merit Systems Protection Board (Board) in Case No. DC34438810242 is dismissed for lack of jurisdiction.

OPINION

I

This case stems from the termination on October 12, 1971, of the petitioner's employment as an architect with the Post Office Department in a reduction in force upon the conversion of the Department to the United States Postal Service. In 1973, the Civil Service Commission upheld the termination. Extensive court litigation followed in the United States District Court for the Eastern District of Virginia and the Court of Appeals for the Fourth Circuit, in which the case was twice remanded to

the Board. See Van Sant v. United States Postal Service, Docket no. DC34438810242, slip op. at 4-6 (MSPB Jan. 9, 1989).

In a lengthy opinion in October 1984, the district court upheld the termination, but ruled that its effective date should have been December 7, 1971, rather than October 12, 1971. Van Sant v. United States Postal Service, Civ. A. No. 81-417-A, slip. op. (E.D. Va. Oct. 24, 1984). The Fourth Circuit affirmed, holding that there was "no merit in Van Sant's contention that he is entitled to reinstatement and back pay to the date of reinstatement." Van Sant v. United States Postal Service, Appeal No. 84-2387 (L), slip op. at 5 (4th Cir. Aug. 29, 1985), cert. denied, 475 U.S.C. 1082 (1986). The Postal Service then offered the petitioner

backpay from October 13, 1971, to January 22, 1972, of $5,600 and the $5,000 attorney fees that the court of appeals previously had awarded him.

After rejecting the offer, the petitioner appealed to the Board, challenging both his separation and the Postal Service's alleged improper implementation of the district court's October 24 decision by offering him only $5,600.

The Board dismissed the appeal. It stated: "He is requesting the Board to order his reinstatement with back pay, notwithstanding the court's order to the contrary. This we cannot do. The Board has no authority to set aside an order of an Article (III) court." Van Sant v. United States Postal Service, Docket No. DC 34438810242, slip op. at 6 (MSPB Jan. 9, 1989). The Board further stated:

> In any event, the broader principle that the Board does not retain jurisdiction to decide a matter which has been judicially adjudicated is applicable here. See Dick v. Office of Personnel Management, 20 M.S.P.R. 566, 568 (1984). Matters resolved by a final decision in a prior appeal are res judicata and are not properly before the Board in subsequent appeals.

Id. at 6-7.

II

The Postal Service has moved to transfer the appeal to the United States District Court for the Eastern District of Virginia. It argues that because the "petitioner's claims involve matters that predate the 1978 Civil Service Reform Act," that court and not this court is the "proper forum for any appeal" of the Board's order dismissing the petitioner's appeal. We agree with the Postal Service that the case is not properly before us, but conclude that we

should not transfer it to the district court. We therefore dismiss the appeal.

A. The Savings Clause of the Civil Service Reform Act of 1978 (Reform Act), provided that:

> No provision of this Act shall affect any administrative proceedings pending at the time such provisions take effect. Orders shall be issued in such proceedings and appeals shall be taken therefrom as if this Act had not been enacted.

Pub. L. No. 95-454, § 902(b), 92 Stat. 1224, 5 U.S.C. § 1101 n. (1988).

The provisions of the Reform Act that gave the Court of Claims and the courts of appeals jurisdiction to review Board orders became final 90 days after the enactment of the Reform Act on October 3, 1978, which was January 11, 1979. Sec. 907, 92 Stat. 1227. Under the Federal Courts Improvement Act of 1982,

this court succeeded to the jurisdiction that the Court of Claims and the courts of appeals were given under the Reform Act. 28 U.S.C. § 1295(a)(9) (1982).

The determination whether we have jurisdiction over this appeal thus turns on whether the petitioner had any administrative proceedings "pending" on the date of the Reform Act. If he did, the Act does not apply to this case, and any appeal should have been taken "as if this Act had not been enacted," i.e., to the district court.

On January 11, 1979, the effective date of the Reform Act, the petitioner's case was on appeal from the Board to the Fourth Circuit. A case is considered "pending" under the Savings Clause if it was "under judicial review" on January 11, 1979. 5 C.F.R.

§ 1201.191(b) (1989). Cf. Wilson v. Turnage, 791 F.2d 151, 155-56 (Fed. Cir. 1986).

The petitioner, however, argues that when the district court determined in October 1984 that the effective date of his termination should have been December 7, 1971, rather than October 12, 1971, the court on that date effected a second separation of the petitioner, retroactive to 1971, and that we have jurisdiction to review that 1984 action. This argument rests upon a misinterpretation of the district court's 1984 decision. The district court there sustained the termination, but ruled that its date should have been December 7, 1971, rather than the earlier date the Postal Service had used. The district court did not thereby effect a new termination but

merely modified the date of the original termination, which it upheld.

B. Under 28 U.S.C. 1631 (1982), if we find that we have no jurisdiction over an appeal, we are to transfer the appeal to a court in which the appeal "could have been brought at the time it was filed" "if it is in the interest of justice" to make the transfer. All of the arguments on the merits that the petitioner makes were fully considered and rejected by the United States District Court for the Eastern District of Virginia and the Court of Appeals from the Fourth Circuit in the several prior cases. There is no reason to think that those courts either (1) would disagree with the Board's conclusion that the issues the petitioner raises now have been fully determined by those decisions, or (2) would reexamine and

reverse their prior rulings. In these circumstances, it would not be "in the interest of justice" to transfer this appeal to the district court.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

VICTOR H. VAN SANT, Appellant,	)	Docket No. DC34438810242
v.	)	
UNITED STATES POSTAL SERVICE Agency.	)	DATE: Jan 9, 1989

Edward E. Wright, Esq., Washington, D.C., for the appellant.

Lynn D. Poole, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

OPINION AND ORDER

The appellant has appealed the decision issued on April 20, 1988, by the Board's Washington Regional Office,

dismissing his appeal for lack of jurisdiction.

For the reasons set forth below, the Board GRANTS the appellant's request to reopen and reconsider the April 20, 1988, decision, AFFIRMS the decision as MODIFIED in this Opinion and Order, and DISMISSES the appeal as barred by res judicata.[1]

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[1] The appellant's appeal arose prior to the enactment of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, effective January 11, 1978 (sic). The law and regulations in effect at the time of the action apply to the appeal. See 5 C.F.R. § 1201.191; Russell v. Department of the Navy, 6 M.S.P.R. 698, 702-03 (1981).

Under the regulations governing the adjudication of the appellant's appeal, 5 C.F.R. §§ 772.307 and 772.308 (1971), the appellant may appeal the decision on the initial appeal to the Board, as well as request reopening and reconsideration of any previous decision if he submits written evidence or argument which tends to meet one or more of the regulatory criteria. Thus, although the appellant has characterized his appeal of the

(continued...)

BACKGROUND

On August 27, 1971, the agency notified the appellant that it was releasing him from his position as an Architect, PS-808-15, because of a reorganization directed by the Postal Reorganization Act of August 12, 1970. Agency File, Tab 4 b. The agency further notified him that there were no other positions available for him and that his separation would be effective October 12, 1971. Id.

The appellant petitioned for appeal of this reduction in force (RIF) action to the Civil Service Commission, alleging that the agency improperly denied him the opportunity to transfer

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[1](...continued)
regional office decision as a petition for review, we have treated it as both an appeal from that decision and a request for reopening and reconsideration of that decision.

with his job function to the Army Corps of Engineers. In its final decision, the Civil Service Commission found that the agency had not transferred the appellant's position to another agency, and sustained the agency action. In 1973 and 1975, the appellant requested the Civil Service Commissioners to exercise their discretionary authority to reopen and reconsider his case. The Commission denied both motions.

The appellant then appealed the Civil Service Commission's decision to the United States District Court for the Eastern District of Virginia, which granted the agency's summary judgment motion. Van Sant v. United States, Civil Action No. 77-756 (E.D. Va. Apr. 27, 1978). On further appeal, the U.S. Court of Appeals for the Fourth Circuit reversed the District Court's

summary judgment for the agency. It remanded the case to the Board for an evidentiary hearing on the appellant's allegation that the agency had transferred his job function to the Corps of Engineers or to any other agency and, if so, whether the appellant was entitled to a transfer to the receiving agency. Van Sant v. United States, Appeal No. 78-1583 (4th Cir. Sept. 7, 1977).

In its remand decision, the Board's Washington Regional Office found that the appellant was not entitled to transfer to the Corps since his job function had not transferred. On appeal, the U.S. District Court affirmed the Board's decision. Van Sant v. United States, Civil Action No. 81-769 (E.D. Va. Feb. 11, 1982). The Fourth Circuit reversed the district court on

appeal and ordered the case to be remanded to the Board again for a complete evidentiary hearing on the appellant's claim. Van Sant v. United States, 705 F.2d 447 (4th Cir. 1983) (table).

After conducting a two-day hearing, the Board's regional office once again concluded that the appellant did not have a right to transfer to the Corps and sustained the RIF action. Van Sant v. United States Postal Service, MSPB Initial Decision No DC03518010006 REM (Jan. 10, 1984); Agency File, Tab 4c. It found that, although corps employees were detailed for short periods to the agency to perform some of the functional activities of the appellant's position, his position did not continue after the completion of the details, but that the responsibilities of the appellant's

position were absorbed into a variety of other agency positions. Id., slip op. at 9-13. It further found that the appellant was not entitled to "compete" under RIF regulations with Corps employees detailed to the agency, since they, as employees of another agency, were not under the same administrative authority as the appellant. Id., slip op. at 7, 12.

On further appeal, the district court again affirmed the Board's decision as to the RIF action, but found this time that the agency's RIF action should not have been made effective until December 7, 1971. Van Sant v. United States Postal Service, Civil Action No. 81-417-A (E.D. Va. Oct. 24, 1984); Agency File, Tab 4d. The court found that it was only when the last Corps employee detailed to the agency completed his

"detail" on December 7, 1971, that the appellant's position or function ceased to continue and there were no longer any detailees in the appellant's competition area. Id., slip op. at 7. Accordingly, it found that the appellant was entitled to back pay for the period from October 12, 1971, until December 7, 1971. Id., slip op. at 7, 12.

The appellant then filed a Motion for Clarification and Enlargement of Relief, contending that the district court's order neither mentioned his service credit, nor directed his reinstatement and thus that it was inconsistent with law and regulations. Agency File, 4f. The district court denied this motion. Van Sant v. United States Postal Service, Civil Action No. 81-417-A (E.D. Va. Nov. 16, 1984); Agency File, Tab 4g.

On appeal to the Fourth Circuit, the court affirmed the district court decision, expressly finding that it saw "no merit in Van Sant's contention that he is entitled to reinstatement and back pay to the date of reinstatement." Van Sant v. United States Postal Service, Appeal No. 84-2387(L) at 4 (4th Cir. Aug. 29, 1985), cert. denied, 475 U.S. 1082 (1986).

The appellant then filed a petition for appeal with the Board's regional office. The appellant alleged that the district court's order erroneously failed to award him appropriate relief in that it did not order his reinstatement, and he requested the Board to enforce the court order in such a fashion as to require the agency to reinstate him and award him appropriate back pay. The administrative judge

dismissed the appeal for lack of jurisdiction on the basis that the Board has no jurisdiction to enforce a court order, citing Thomas v. Department of State, 12 M.S.P.R. 555, 559 (1982). Initial Decision (I.D.) at 3.

In his petition for review, the appellant argues that the Board's decision in Thomas is inapplicable because he "is not asking the Board to enforce a district court order at all," but rather to disregard it as an "unenforceable," ultra vires order under Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194 (1947), and Horne v. Merit Systems Protection Board, 684 F.2d 155 (D.C. Cir. 1982).

ANALYSIS

We agree with the appellant's contention that he is not seeking enforcement of the district court's

order, but rather seeks to avoid it. He is requesting the Board to order his reinstatement with back pay, notwithstanding the court's order to the contrary. This we cannot do. The Board has no authority to set aside an order of an Article 3 court. The appellant cites to case law where the courts have determined that they are powerless to affirm an agency action where the agency grounds are inadequate or inappropriate. See Securities and Exchange Commission v. Chenery Corp., 322 U.S. at 207; Horne v. MSPB, 684 F.2d at 155. That case law, however, does not support setting aside a court order after all judicial appeals have been exhausted and the grounds for the agency action have been judicially found to be adequate. Cf. Federated Department Stores v. Moitie, 452 U.S. 394, 400-02 (1981) (res

judicata effect may preclude altering an erroneous judgment because of public policy). In any event, the broader principle that the Board does not retain jurisdiction to decide a matter which has been judicially adjudicated is applicable here. See Dick v. Office of Personnel Management, 20 M.S.P.R. 566, 568 (1984). Matters resolved by a final decision in a prior appeal are res judicata and are not properly before the Board in subsequent appeals. McKenzie v. U.S. Postal Service, 1 M.S.P.R. 496, 497-98 (1980).

Accordingly, we conclude that this appeal is barred by res judicata and must be dismissed. See Dick, 20 M.S.P.R. at 566.

NOTICE TO APPELLANT

This is the Board's final decision in this matter. There is no further right

of administrative appeal from a decision of the Merit Systems Protection Board on appeal. This case is considered to be closed by the Board since all administrative appeals rights have been exhausted. Any further remedy concerning this case lies in the federal court system.

FOR THE BOARD:

_____

Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-2387(L)

Victor Van Sant,

Appellant,

versus

United States Postal Service;
U.S. Army Corps of Engineers and
Merit System Protection Board,

Appellees.

No. 85-1007

Victor Van Sant,

Appellee,

versus

United States Postal Servics;
U.S. Army Corps of Engineers and
Merit System Protection Board,

Appellants.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge. (C/A 84-417)

Argued: July 18, 1985

Decided: August 29, 1985

Before WINTER, Chief Judge, and WIDENER and WILKINSON, Circuit Judges.

PER CURIAM:

This is the fourth appeal in Victor Howard Van Sant's suit against the United States Postal Service, et al., resulting from the termination of his position as a "planning architect" with the Service. Van Sant claims violation of his rights under the Veterans' Preference Act of 1944, 5 U.S.C. § 3503(a), and under 5 C.F.R. § 351.201 et seq. of the civil service regulations. In the first appeal, we held that the Civil Service Commission had failed to develop a sufficient evidentiary record to justify its conclusion that Van Sant had not been denied any of his rights. We therefore directed the district court to remand the case to the Commission for a complete evidentiary hearing. Van Sant v. United States, No. 78-1583 (4 Cir. Sept. 7, 1979) (unpublished).

The Civil Service Commission (now the Merit Systems Protection Board (MSPB)) con-

ducted a hearing and again sustained Van Sant's separation. Van Sant sought to appeal directly to us, but we dismissed the appeal for lack of jurisdiction. Van Sant v. United States, No. 80-1531 (4 Cir. April 28, 1981) (unpublished). Van Sant then properly appealed to the district court, which affirmed the MSPB decision sustaining Van Sant's removal.

In a third appeal to us, we again reversed the judgment and directed that the case be remanded to the MSPB for a further evidentiary hearing. Van Sant v. U.S. Postal Service, No. 82-1305 (4 Cir. Mar. 24, 1983) (unpublished). We stressed that our repeated remands to MSPB were for the agency to take a realistic rather than a technical view of Van Sant's employment treatment. Specifically, we directed MSPB to determine if in fact employees of the Corps of Engineers (COE), to which Van Sant's job functions were purportedly transferred, con-

tinued to perform those functions for the Postal Service after Van Sant was discharged, and if so for what period of time.

After the last remand, MSPB again upheld the validity of Van Sant's discharge. The district court affirmed in part and reversed in part--correctly, we think. The MSPB found that after Van Sant received his termination notice (August 27, 1971) "essentially there was no dispute" that COE employees were detailed to the Postal Service to perform his job function until December 7, 1971. Notwithstanding the MSPB's legal opinion that this did not constitute a transfer of function, the district court discerned the reality of what occurred: "the same FDS work--Van Sant's work--was still being done; it was simply being done by COE personnel." The district court therefore ruled that it was only from December 7, 1971, the date that COE employees last performed Van Sant's former

job function, "that plaintiff's termination can be valid." It rejected Van Sant's argument that his job continued after that date, concluding that his various duties were validly dispersed among other positions. It awarded Van Sant the pay he would have received from his date of release (October 12, 1971) to the time that he would have been released had he received a notice of termination of December 7, 1971.

We agree with the factual and legal conclusions of the district court. We see no merit in Van Sant's contention that he is entitled to reinstatement and back pay to the date of reinstatement. We affirm on the memorandum opinion of the district court. Van Sant v. United States Postal Service, Civil Action No. 84-417-A (E.D. Va. October 24, 1984) (unpublished). AFFIRMED.

*Van Sant appeals from the part of the judgment limiting his relief. He contends that he is entitled to reinstatmeent and back pay until the effective date of reinstatment. The Postal Service appeals from the part of the judgment awarding Van Sant back pay for a limited period.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

VICTOR HOWARD VAN SANT, Plaintiff,	)	CIVIL ACTION NO. 87-417-A
v.	)	
UNITED STATES POSTAL SERVICE, UNITED STATES CORPS OF ENGINEERS, and MERIT SYSTEMS PROTECTION BOARD, Defendants.	)	

MEMORANDUM OPINION

This action is an appeal from a January 10, 1984 decision of the Merit Systems Protection Board (MSPB). The issues raised on appeal relate to the propriety of the plaintiff's October 12, 1971 termination through a reduction in force (RIF) of his employment as a planning architect with the United States Postal Service (USPS).1/ These issues have been the subject of

1/ Notice of the termination was given on August 27, 1971, but the plaintiff's last day of work was originally October 5, 1971, and by extension October 12, 1971.

two prior appeals. The first resulted in an opinion of this court affirming the original MPSB decision to uphold plaintiff's termination, which MSPB issued on August 1, 1973. Van Sant v. United States, Civil Action No. 77-756 (E.D.Va., decided April 27, 1978) (Van Sant I). The United States Court of Appeals for the Fourth Circuit reversed that decision remanding the case to the MSPB for a further evidentiary hearing. Van Sant v. United States, Appeal No. 78-1583 (4th Cir., decided Setember 7, 1979) (Van Sant II). The evidentiary hearing on remand again resulted in a decision adverse to the plaintiff. Van Sant v. United States Postal Service, MSPB Case No. DCO35100006 (decided June 11, 1980) (MSPB I). That was appealed, with this court affirming. Van Sant v. United States Postal Service, Civil Action No. 81-769 (E.D.Va., decided February 11, 1982 (Van Sant III). The Court of Appeals again reversed and remanded for a

more complete evidentiary hearing. Van Sant v. United States Postal Service, Appeal No. 82-1305 (4th Cir., decided March 24, 1983) (Van Sant IV). Pursuant to this remand the MSPB conducted a two-day hearing on November 28 and 29, 1983. The plaintiff, now represented by counsel, appeared and testified, and his counsel cross-examined witnesses of the USPS. The plaintiff now seeks review of the MSPB's decision following that hearing, which once again upheld plaintiff's termination. Van Sant v. United States Postal Service, MSPB Case No. DC0351802006REM (decided January 10, 1984) (MSPB II).

The court has read the transcript of the two-day hearing as well as referred to the exhibits and portions of the previous hearings where so directed by counsel and where necessary to resolve the issues presented.

Transfer of Function

Prior to his termination, plaintiff was a "planning architect" in the Plant Engineering Branch of the Research and Development Department of the United States Post Office (POD). The "planning architect" is to be distinguished from the "design architect." The latter refers to professional architects with responsibility for detailed architectural and aesthetic design in the Department of Facilities in the POD. The former, of which plaintiff was one, and as their task the development of "functional design specifications" (FDS). The plaintiff, who is not a professional architect, insists that no official distinction is made between a planning and a design architect; but neither does he dispute that the planning architect's job did not require the skill or training of a professional architect. The MSPB found, and the record supports this finding, that FDS tasks were a separate function not transferred to the

Corps of Engineers (COE) when, on June 29, 1971, the POD transferred to the COE the responsibility for the tasks performed by the "design architects." Apparently the plaintiff did not argue to the contrary before the MSPB (see MSPB II at 4-5), although he does in this appeal.

The POD group to which the plaintiff did belong was the Plant Engineering Branch for Research and Development. As a "planning architect," the plaintiff's tasks included preparing drawings that would outline site dimensions, parking facilities, size of buildings, look-out arrangements, and computation of square footage per personnel, some of which were prepared even before a particular postal facility site was selected. Certain FDS work, such as systems layout, was apparently reserved for Industrial Engineering Technicians (IET's) even before the plaintiff's loss of position. In contrast, the design architects

who were transferred to the COE belonged to another branch, the Bureau of Facilities. They were the professional architects concerned with the actual building design and construction, tasks not within the plaintiff's responsibility or expertise.

The June 27th transfer was part of a plan for COE to take over construction responsibilities formerly held by the POD. Thereafter, the POD (which became the USPS several days later on July 1, 1971) had as its primary concern moving the mail. To this end it had a diminished interest in and responsibility for buildings and structures.

Following the July 1, 1971 reorganization of POD into the USPS, the Research and Engineering Department was abolished, and the planning architects were trnasferred to the Mail Processing Branch of USPS. Consistent with USPS's diminished responsibility for building design and constructin, there were no architectural, design or

planning, tasks for the plaintiff to perform. Were this all, the termination of the plaintiff and the other planning architects on grounds that "no other work [was] available" would be unassailable on the merits, since it is clear that no other permanent, full-time position was estabished in any competitive area for which the plaintiff qualified.2/

Detailing of COE Architects to USPS

The Plaintiff's principal argument is that, on June 28, 1971, COE "detailed" eight employees, four of whom were architects,3/ to the USPS Mail Processing Group to do FDS work, which in reality had been plaintiff's work. These four architects were former POD employees that were among the 136 employees previously sent to COE with the transfer of

2/ The plaintiff contests this, as will be discussed infra, pp. 7-11.

3/ The other four were engineers, and their status, according to the plaintiff, is not relevant to the issues before the court.

the POD Department of Facilities design and construction function. Since the four "detailees" were still performing FDS work for the USPS at the time of the plaintiff's August 27, 1971 termination notice, the plaintiff asserts that the FDS function had in fact been transferred to COE. As a consequence, of course, he would retain his Veterans preference and could not have been "RIF'd," as pointed out in previous opinions in the case.

It is not necessary for the court to adopt the plaintiff's position as far as actual transfer of function to the COE is concerned. It finds that, under the reality test set forth by the Court of Appeals in its March 24, 1984 remand decision, the plaintiff can, at least to some extent, prevail.

The first question of what work was being done by those "detailees" is a question of fact. The decision of the MSPB

on this aspect of the case is, in part:

> These employees [detailees] performed work being done in the Mail Processing Group, including functional design specification work. The 1980 decision in this case set out in detail that at the time of this detail, the appellant's responsibilities were to develop functional design specifications (FDS) for postal facilities. See pages 2 and 3. Of concern in this appeal is the fact that appellant was RIF'ed because there was no other work available while COE employees were doing FDS work on detail.

MSPB II at 4.

> There is, however, essentially no dispute about what the nature of the assignments given the COE architects [detailees] was. In 1980, the appellant and the USPS stipulated that if those COE employees who had been detailed were to testify they would verify that they were detailed and that while on detail worked on FDS packages. At the most recent hearing two of these former detailees did so testify. See testimony of Blanchard and Carnahan. In addition, records were reviewed with regard to the other architect detailees, Messrs. Miller, Milaknis and Dickerson. This testimony was concurred in by their former COE supervisor, Mr. Barnes, and by the USPS official, Mr. Weirnicki. Also, Mr. Weirnicki's August 1, 1971 request for an extension of the details reflects the COE employees would be doing FDS packages. Appellant's Motion for Summary Judgment.

MSPB II at 7.

The decision then, in conclusory terms, points out that:

> The detail of some employees to an office whether in their employing agency or another, does not constitute a transfer of function as there is no transfer of the function from one competitive area to another.

MSPB II at 7.

This begs the second question of what constitutes a transfer. The issue is not whether there is some formal transfer of function, but whether the detailing of these four architects to do work which the plaintiff could and had been doing was in reality a transfer of those architects (see Van Sant IV at 8). If so there was "other work available." The court does find a transfer in reality because the same FDS work - Van Sant's work - was still being done; it was simply being done by COE personnel.

The MSPB further states that detailees of COE could not be RIF'd by USPS because they did not work for USPS, and consequently were not similarly situated for purposes of

determining whether employees lacking the plaintiff's preference must be RIF'd before the plaintiff. This again ignores the reality of the situation, lifting form over substance.

Finally, the Court of Appeals directed on remand that inquiry be made into the length of time the "detailees" worked for the USPS. The MSPB found that the last of them completed his "detail" on December 7, 1971. The record supports this, as well as the finding that thereafter "no other work [was] available" because neither the plaintiff's position nor his former task was continued and because the detailees were no longer in the plaintiff's competitive area.

In summary, it is only from the December 7, 1971 date that the plaintiff's termination can be valid. He is therefore entitled to the pay he would have received from October 12, 1971, the day he was released, until the time he would have been

released had a notice of termination been given him on December 7, 1971.

IET

The plaintiff alternatively argues that the FDS work, if retained by USPS, did not just disappear, but had to be done by someone.4/ It is true that after October, 1971, the FDS duties were absorbed by the Engineering Systems Design Branch of the Mail Processing Group of USPS; however, the specific disciplines in that branch were engineering and performed by IET's. Since the FDS duties were basically planning rather than architectural duties, the plaintiff claims that he should have been considered for one of these IET positions.

The defendants reply that the issue of plaintiff's being considered for an IET position is not before the court; that it is

4/ The MSPB, in its January 10, 1984 decision concluded that the 1980 decision that plaintiff's work had been contracted out was in error, and that this work had not been contracted out.

not within the terms of the remand from the Fourth Circuit; and that the plaintiff did not raise the issue before the MSPB in the latest hearing until his post hearing brief.

In deciding whether this issue can now be heard, the court notes the plaintiff first raised it before the Civil Service Commission (CSC) in 1972. In rejecting the plaintiff's position, the CSC Appeals Examining Office, on March 11, 1972, stated the following:

> With regard to the PS-895-14 Industrial Engineering Technician positions occupied by Messrs. John J. and Louis W. Huff, we find that your education, training, and experience show your qualifications to be preponderantly in the area of Architecture. It appears that your main emphasis has been planning and designing structures whereas the Industrial Engineering Technician position as utilized by the U.S. Postal Service require the design and evaluation of mail-flow systems within postal structures.

MSPB I, Ad. Rec. Part I at 156.

While not specifically addressed in the complaints filed in this court, the issue was again raised in 1980 when the Appeals

Officer explored the question of what work the Mail Processing Department was doing after it absorbed the duties of the Research and Engineering Department. At that hearing the following colloquy occurred between the Appeals Officer and the witness Clements, a structural engineer with the USPS in 1971:

Q. The Research and Engineering Department was abolished approximately the same time, or some time in the fall of 1971, is that correct?

A. I guess it did, yes. It was abolished July 28, 1971 and became Mail Processing.

Q. It became Mail Processing. There had not been a Mail Processing prior to that, is that correct.

A. I'm not sure about that. We went through so many organizational changes.

Q. But it is true that the Mail Processing Department took over the functions of the Research and Engineering Department?

A. This is correct.

Q. Okay. And the duties that Mr. Van Sant performed in Research and Engineering were, then, performed by the Mail Processing Division?

A. Right.

Q. And who performed those duties in the Mail Processing Division?

A. Well, Mr. Van Sant and people that had been in Research and Enginnering.

Q. After the architects separated by reduction of force, who performed those duties?

A. Practically all of it, if not all of it, went to an outside consultant.

Q. And the planning?

A. The planning work, like Mr. Van Sant was doing.5/

MSPB I, Ad. Rec. Part III at 76-77.

At the most recent MSPB hearing the Appeals Officer stated at the outset that "... the pleadings, the materials which have been previously submitted in previous considerations of this matter are already in eivdnece and will be considered...." MSPB II, Ad. Rec. Part IV at 12. Moreover, the plaintiff's counsel made it clear that the IET argument was part of the plaintiff's case. MSPB II, Ad. Rec. Part IV at 89-90.

5/ As previously indicated, this was proved to be incorrect.

Certainly the remand of the Court of Appeals did not foreclose consideration of the issue. While specifying certain issues to be addressed on remand, it directed the MSPB to make findings of fact on those "and any other relevant issue." Van Sant IV at 10.

Finally the MSPB did address the issue in the following language:

> I find that the preponderance of the testimony, including the appellant's, and the documentary evidence indicates that following the RIF, no one took over the "position" which the appellant had occupied. Rather the duties (sic) responsibilities which had been assigned to the appellant were absorbed into other positions in the new Engineering Systems Design Branch. Some duties were included in the project manager's position. Most of the drawing and drafting duties were assigned to various engineering technicians. Agencies generally have the authority to organize as they deem appropriate.

MSPB II at 11.

Consequently the court finds that the IET issue is properly before it.

The plaintiff's argument, however, was initially rejected on March 11, 1971 by the

CSC Appeal Examining Office in the language quoted above, and the records bear out the Commission's judgment. The "architectural" duties of the FDS did not "have to be done by someone" in the sense that one individual take over plaintiff's work. Instead the FDS duties could be split among several individuals and that apparently is what has happened here. After the reorganization, the planning duties of the plaintiff were taken over by the IET's, variously referred to as Huff, Ruff and Simmons, who were qualified to perform systems engineering, which they continued to do, and who apparently were also qualified to do the planning work. The plaintiff was qualified only to do the planning work, yet now seeks to have one of the IET's, while doing work the plaintiff cannot do, "bumped" in his favor.

There is no obligation, however, on the part of the USPS to accommodate the plaintiff by separating the planning from the

systems work so he will have a full time job. The USPS could use its business judgment to organize itself so that the IET's jointly shared in the FDS Work. There was just no place for an "architect" with the plaintiff's credentials in the reorganized Postal Service, and the Service was not required to create one.

Procedural Arguments

Much of the plantiff's argument as to the procedural deficiencies of his termination has to do with the formal validity of the "detailing" and the failure to include the detailees within the plantiff's competitive area. These have been resolved in prior parts of this opinion. Plaintiff has shown no deficiency in procedures used to carry out the RIF.

Conclusion

For the foregoing reasons the decision of the MSPB will be affirmed except to the extent that it found the plaintiff's notice

of termination to be proper as of August 27, 1971. The proper date for notice of termination is determined to be December 7, 1971.

/s/ A.V.B., J.
United States District Judge

Alexandria, Virginia
October 24, 1984

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

VICTOR HOWARD VAN SANT, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 87-417-A
UNITED STATES POSTAL SERVICE, UNITED STATES CORPS OF ENGINEERS, and MERIT SYSTEMS PROTECTION BOARD, Defendants.	)	

O R D E R

For the reasons set forth in the Memorandum Opinion this day filed, it is

ORDERED that the January 10, 1984 decision of the Merit Systems Protection Board is reversed only insofar as it determined that the proper date of the plaintiff's notice of termination was August 27, 1971, the court now determining that the proper date for the notice of termination is December 7, 1971. In all other respects the said decision is affirmed. And it is further

ORDERED that the plaintiff be paid additional salary and benefits which he would have been paid had the notice of termination been given on December 7, 1971 instead of August 27, 1971.

/s/ A.V.B.,J.
United States District Judge

Alexandria, Virginia
October 24, 1984

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

89-3163

VICTOR H. VAN SANT,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

JUDGMENT

ON APPEAL FROM THE MERIT SYSTEMS PROTECTION BOARD

in CASE NO(S). DC34438810242

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: DISMISSED

ENTERED BY ORDER OF
THE COURT

DATED Oct 06 1989
S/ Francis X. Gindhart
Francis X. Gindhart,
Clerk

ISSUED AS A MANDATE: NOVEMBER 13, 1989

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

89-3163

VICTOR H. VAN SANT,
Petitioner, v.

UNITED STATES POSTAL SERVICE,
Respondent.

O R D E R

Before FRIEDMAN, Circuit Judge, BISSELL, Circuit Judge, and MAYER, Circuit Judge.

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for petitionor rehear- ing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on

November 10, 1989. FOR THE COURT,

S/_____

Francis X. Gindhart

Clerk

Dated: November 3, 1989

...

Note: this order has not been prepared for publication in a reporter.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

89-3163

VICTOR H. VAN SANT,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

O R D E R

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, declined.

FOR THE COURT,

Francis X. Gindhart
Clerk

Dated: November 17, 1989

Note: This order has not been prepared for publication in a reporter.

U.S. Constitution Fifth Amendment

"No person shall be ... deprived of life, liberty, or property without due process of law ..."

U.S. Constitution Fourteenth Amendment

§1. "... No State shall ... deny to any person within its jurisdiction the equal protection of the laws."

5 U.S.C. §1101 Note to Civil Service Reform Act of 1978

Savings Provisions. Section 902 of Pub.L. 95-454 provided that: ...

(b) No provision of this Act shall affect any administrative proceedings pending at the time such provision takes effect. Orders shall be issued in such proceedings and appeals shall be taken therefrom as if this Act had not been enacted.

...

(As amended Pub.L. 95-454, Title II, §201(a), Oct. 13, 1978, 92 Stat. 1119.)

5 U.S.C. Sec. 3503. Transfer of functions [in force in 1971]

(a) When a function is transferred from one agency to another, each

preference eligible employed in the function shall be transferred to the receiving agency for employment in a position for which he is qualified before the receiving agency may make an appointment from another source to that position.

(b) When one agency is replaced by another, each preference eligible employed in the agency to be replaced shall be transferred to the replacing agency for employment in a position for which he is qualified before the replacing agency may make an appointment from another source to that position. (Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 429.)

5 U.S.C. § 5596. Back pay due to unjustified personnel action

...

(b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee --

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect --

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period;...

(B) for all purposes, is deemed to have performed service for the agency during that period ...

(c) The Office of Personnel Management shall prescribe regulations to carry out this section...

(Added Pub.L. 90-83, §1(34)(C), Sept. 11, 1967, 81 Stat. 203, and amended Pub.L. 94-172, §1(a), Dec. 23, 1975, 89 Stat. 1025; Pub.L. 95-454, Title VII, §702, Oct. 13, 1978, 92 Stat. 1216; Pub.L. 96-54, §2(a)(14), Aug. 14, 1979, 93 Stat. 382; Pub.L. 96-465, Title II, §2306, Oct. 17, 1980, 94 Stat. 2165; Pub.L. 100-202, §101(m) [Title VI, §623(a)], Dec. 22, 1987, 101 Stat. 1329-428.)

5 U.S.C. §7703. Judicial review of decisions of the Merit Systems Protection Board

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of

Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board. (As amended Pub. L. 97-164, Title I, §144, Apr. 2, 1982, 96 Stat. 45.)

28 U.S.C. §43. Creation and composition of courts

(a) There shall be in each circuit a court of appeals, which shall be a court of record, known as the United States Court of Appeals for the circuit. (As amended Nov. 13, 1963, Pub.L. 88-176, §1(a), 77 Stat. 331.)

28 U.S.C. §1291. Final decision of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United STates, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(As amended Oct. 31, 1951, c.655, §48, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, §12(e), 72 Stat. 348; Apr. 2, 1982,

Pub.L. 97-164, Title I, § 124, 96 Stat. 36.)

28 U.S.C. § 1295. Jurisdiction of the United States Court of Appeals for the Federal Circuit

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction --

...

(9) of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5; ...

(Added Pub.L. 97-164, Title I, § 127(a), Apr. 2, 1982, 96 Stat. 37, and amended Pub.L. 98-622, Title II, § 205(a), Nov. 8, 1984, 98 Stat. 3388; Pub.L. 100-418, Title I, § 1214(a)(3), Aug. 23, 1988, 102 Stat. 1156; Pub.L. 100-702, Title X, § 1020(a)(3), Nov. 19, 1988, 102 Stat. 4671.)

28 U.S.C. § 1631. Transfer to cure want of jurisdiction

Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the

court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.
(Added Pub.L. 97-164, Title III, § 301(a), Apr. 2, 1982, 96 Stat. 55.)

28 U.S.C. § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

...

(As amended May 24, 1949, c. 139, § 90, 63 Stat. 102.)

28 U.S.C. § 2071. Rule-making power generally

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

(b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order.

(c)(1) A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit.

(2) Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.

(d) Copies of rules prescribed under subsection (a) by a district court shall be furnished to the judicial council, and copies of all rules prescribed by a court other than the Supreme Court under subsection (a) shall be furnished to the Director of the Administrative Office of the United States Courts and made available to the public.

(e) If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment.

(f) No rule may be prescribed by a district court other than under this section.
(As amended May 24, 1949, C. 139, § 102, 63 Stat. 104; Nov. 19, 1988, Pub.L. 100-702, Title IV, § 403(a)(1), 102 Stat. 4650.)

28 U.S.C. § 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. (Added Nov. 19, 1988, Pub.L. 100-702, Title IV, § 401(a), 102 Stat. 4648.)

5 C.F.R. Part 351, Subpart H--Notice to Employee

§351.801 Notice period.

(a) Each competing employee selected for release from a competitive level under this part is entitled to a written notice at least 30 full days before the effective date of release. When a general notice is supplemented by a specific notice, an agency may not release an employee from his or her competitive level until at least 10 days after the employee's receipt of the specific notice.

(b) The notice shall not be issued more than 90 days before release except with the prior approval of OPM.

(c) The notice period begins the day after the employee receives the notice.

...

§ 351.805 Expiration of notice.

...

(b) A specific notice expires except when followed by the action specified or by action less severe than specified in the notice or in an amendment made to the notice before the agency takes the action. An agency may not take action before the effective date in the specific notice. An action taken after the specified date in the specific notice shall not be ruled invalid for that reason except when it is challenged by a higher-standing employee in the competitive level who is reached out of order for reduction in force as a result of the action or when it results in a notice period longer than the maximum allowed.

* * *

5 C.F.R. Part 550, Subpart H - Back pay

§ 550.801 Applicability.

(a) This subpart contains regulations of the Office of Personnel Management to carry out section 5596 of title 5, United States Code ...

* * *

§ 550.803 Definitions.

In this subpart:

"Unjustified or unwarranted personnel action" means an act of commission or an act of omission (i.e., failure to take

an action or confer a benefit) that an appropriate authority subsequently determines, on the basis of substantive or procedural defects, to have been unjustified or warranted under applicable law, Executive order, rule, regulation, or mandatory personnel policy established by an agency or through a collective bargaining agreement. Such actions include personnel actions and pay actions (alone or in combination).

* * *

§ 550.805 Back pay computations.

(a) When an appropriate authority corrects or directs the correction of an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due an employee --

(1) The employee shall be deemed to have performed service for the agency during the period covered by the corrective action; and

(2) The agency shall compute for the period covered by the corrective action the pay, allowances, and differentials the employee would have received if the unjustified or unwarranted personnel action had not occurred.

* * *

5 C.F.R. Part 1200, Subpart G--Saving Provisions

§ 1201.191 Saving provisions.

. . .

(b) Administrative proceedings and appeals therefrom. No provision of the Civil Service Reform Act shall be applied by the Board in such a way as to affect any administrative proceeding pending at the effective date of such provision. "Pending" is considered to encompass existing agency proceedings, and appeals before the Board or its predecessor agencies, that were subject to judicial review or under judicial review on January 11, 1979, the date on which the Act became effective. An agency proceeding is considered to exist once the employee has received notice of the proposed action.

...

U.S. Postal Service "Employee and Labor Relations Manual"

§ 436 Back Pay

436.1 Corrective Entitlement

.11 An employee or former employee is entitled to receive back pay for the period during which an unjustified or unwarranted personnel action was in effect which terminated or reduced the basic compensation, allowances, differentials, and employment benefits which the employee normally would have earned during the period.

.12 For purposes of entitlement to employment benefits, the employee is

considered as having rendered service for the period during which the unjustified or unwarranted personnel action was in effect.

436.2 Limitations

.21 Any amount earned by the employee in a new employment or in an enlarged part-time employment to replace Postal Service employment must be determined and offset against the amount of the reimbursement to which he would be entitled.

...

Federal Rules of Appellate Procedure Rule 47. Rules by Courts of Appeals

Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules. Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.

U.S. Federal Circuit Court of Appeals Local Rule 47.8 Opinions and orders of the court

(a) Disposition of appeals.-- Disposition of appeals may be announced in a published or unpublished opinion or order. "Published" means the opinion or

order has been prepared and forwarded for publication in one or more commercial reports of decisions. "Unpublished" means an opinion or order that has not been prepared for publication in a commercial report of decisions.

(b) Orders.--The action of the court in granting or denying motions, petitions, and similar actions may be announced in a published or unpublished order.

(c) Unpublished opinions and orders.--Unpublished opinions and orders are those unanimously determined by the panel as not adding significantly or usefully to the body of law and not having precedential value. Opinions and orders designated as unpublished shall not be employed as precedent by this court, and may not be cited by counsel as precedent, except in support of a claim of res judicata, collateral estoppel, or law of the case.

(d) Request for publication.--Any person may request that an unpublished opinion or order be reprepared and reissued for publication, citing reasons therefor. Such request will be granted or denied by the panel that rendered the decision.

(e) Public records.--All decisions, and opinions and orders accompanying decisions of this court shall be provided to the parties, shall be public records of the court, and shall be accessible to, and subject to comment and reproduction by, the public.

36.3 Publication of decisions. Opinions delivered by the Court will be published only if the author or a majority of the joining judges believe the opinion satisfies one or more of the standards for publication:

i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or

ii. It involves a legal issue of continuing public interest; or

iii. It criticizes existing law; or

iv. It contains an historical review of a legal rule; or

v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.

36.4 Unpublished dispositions. Unpublished opinions give counsel, the parties and the lower court or agency a statement of the reasons for the decision. They may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court. They are sent only to the trial court or agency in which the case originated, to counsel for all parties in the case, and to litigants not represented by counsel. The Federal

Reporter periodically lists the result in all cases involving unpublished opinions. Copies of any unpublished opinion are retained in the file of the case in the Clerk's Office and a copy may be obtained from the Clerk's Office for $1.00.

Counsel may move for publication of an unpublished opinion, citing reasons. If such motion is granted, the unpublished opinion will be published without change in result.

36.5 Citation of unpublished dispositions. In the absence of unusual circumstances, this Court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.

If counsel believes, nevertheless, that an unpublished disposition of any court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court., Such service may be accomplished by including a copy of the disposition in the appendix to the brief.

Rule 60. Relief From Judgment or Order

...

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceedings for the following reasons: ... (4) the judgment is void; ...

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 2, 1987, eff. Aug. 1, 1987.)